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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO

STEVE KASPER, on behalf of himself and all others similarly situated, Plaintiff, vs. **NFHS NETWORK, LLC.**, a Delaware Limited Liability Company, Defendant.	Case No.: 3:24-cv-04682-JD District Judge: Hon. James Donato **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION** Date: October 10, 2024 Time: 10:00 a.m. Crtrm: 11 Complaint Filed: June 20, 2024 FAC Filed: July 1, 2024 Removal Filed: August 1, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. INTRODUCTION

Plaintiff filed his Complaint seeking public and private injunctive relief (in addition to punitive and statutory damages, and reasonable attorneys' fees and costs) to prevent Defendant from sharing his and other consumers' private video viewing habits with Meta. In response, rather than removing the offending tracking tools from its website and stopping its unlawful sharing of its customers' private information, Defendant has filed a motion to compel arbitration of Plaintiff's claims.

Defendant's motion must be denied for any of the four reasons. First, to the extent any agreement to arbitrate has been formed (which Plaintiff categorically denies), Plaintiff has opted-out of the Dispute Resolution Provision ("DRP"), and is therefore not bound by it. This should end the Court's enquiry. Second, Defendant and Plaintiff never agreed to arbitrate their claims; on *not one* of the five occasions that Plaintiff either created a free account or subscribed to Defendant's service, did he agree to a binding arbitration provision. Third, even if this Court finds that there was, at some time, an agreement to arbitrate Plaintiff's claims arising during one or more of the five discrete periods during which Plaintiff was an NFHS Network subscriber, the delegation clause contained within the arbitration agreement and the arbitration agreement as a whole are unenforceable because if enforced, they would effectively prevent Plaintiff from vindicating his statutory rights and obtaining the public injunctive relief he seeks. And, finally, the delegation clause and the arbitration agreement as a whole are procedurally and substantively unconscionable such that the Court should refuse to enforce them.

II. STATEMENT OF FACTS

In February 2016, Plaintiff Kasper created a free account to access Defendant's website to view a few sports games at his former high school. Decl. of Steve Kasper ("Kasper Decl."), filed herewith, ¶ 3. Defendant claims that in creating his free account, Plaintiff checked a box next to the statement: "I accept the Terms and Conditions," which, at the time, would have been the 2014 Terms of Use. Def. Mot. at 8-9. In September 2016, Plaintiff created a paid subscription agreement with NFHS on Defendant's website. Kasper Decl. ¶ 4. Nothing in the process by which Plaintiff created his paid subscription put him on notice that by doing so he would be agreeing to be bound by any Terms of Use ("TOU"). Plaintiff subsequently entered into three additional subscription agreements with Defendant for the periods August 2017 through January 2018, November 2018 through December 2018, and March 2021 through October 2021. Id. ¶¶ 5-

7. Each time Plaintiff entered into one of these new subscription agreements, he did not agree to be bound by any TOU, did not see any hyperlink linking to the TOU, and was not presented with any click box that stated, "I agree to the Terms of Use" or "I accept the Terms of Use." Id. In February 2023, Plaintiff used his mobile phone to enter into a subscription agreement for NFHS with Apple, Inc., through its Apple App. Store. Id. ¶ 8. In entering into this agreement, Plaintiff did not agree to be bound by any TOU, did not see any hyperlink linking to the TOU, and was not presented with any click box that stated, "I agree to the Terms of Use" or "I accept the Terms of Use." Id. At no time when he accessed Defendant's content, either through the website or the mobile app, was Plaintiff presented with the contents of Defendant's TOU. Id. ¶¶ 3-9. At no time, did Plaintiff ever click on a link to Defendant's TOU. Id. ¶¶ 3-10.

On February 14, 2024, Defendant updated its TOU. The updated TOU ("2024 TOU") contains an opt-out provision, which reads as follows:

> "You may opt out of this dispute resolution provision (except for the jury trial waiver above) by notifying NFHS Network of that intent during the Opt-Out Period stating that you are opting out of this dispute resolution provision."

Huddle Decl. Ex. 5 (Dkt. 16-12), p. 19.

The Opt-Out Period is not defined anywhere in the 2024 TOU. Plaintiff provided three opt-out notices to Defendant: on February 23, 2024 (*see* Dkt. 16-2), on June 30, 2024 (*see* Dkt. 1-2), and on September 11 (*see* Decl. of Julian Hammond ("Hammond Decl."), filed herewith, Ex. 5).

III. ARGUMENT

A. PLAINTIFF HAS OPTED-OUT OF THE ARBITRATION AGREEMENT

Defendant's Motion asserts that Plaintiff is bound by Defendant's 2024 TOU and that the 2024 TOU supersede all prior versions. *See, e.g.,* Def. Mot., pp. 3:4-5, 14:15-19, 15:3-5. Even assuming, *arguendo*, that Plaintiff was bound by the 2024 TOU, as stated above, the 2024 TOU contain an opt-out provision (quoted above). *See* Huddle Decl. Ex. 5 (Dkt. 16-12), p. 19. And, Plaintiff opted out of that dispute resolution provision when he filed a complaint in the Central District of California on February 23, 2024, which was less than 10 days after Defendant purports that Plaintiff was provided notice of the 2024 TOU, and when he filed his Complaint in state court on June 30, 2024 (which was then removed to this Court). *See* Def. Mot. 13:23-16; Huddle Decl. ¶ 32. To the extent Defendant argues that filing a complaint, in court, does not constitute an opt-out, Plaintiff also notified NFHS Network by letter dated

September 11, 2024, of his opting out. *See* Hammond Decl. Ex. 5. We note the opt-out provision refers to an "Opt-Out Period" during which an opt out can be effective, but the 2024 TOU does not define that Period anywhere, and, thus, it cannot operate to render ineffective any opt out submitted by Plaintiff based on the date of submission.

Accordingly, even if Plaintiff was bound by the 2024 TOU and the agreement to arbitrate therein, Defendant asserts that the 2024 TOU supersede all prior versions, and Plaintiff has opted out of the dispute resolution provision of the 2024 TOU. Thus, Defendant's Motion is fatally undercut and must be denied in its entirety.

B. NO AGREEMENT TO ARBITRATE WAS FORMED

1. Applicable Legal Standard

The party seeking arbitration bears "the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence." *Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279, 1283 (9th Cir. 2017) (internal citation and quotation omitted). In determining whether an agreement was formed, the court applies "general state-law principles of contract interpretation," without a presumption in favor of arbitrability. *See Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 742 (9th Cir. 2014) (quotation omitted).[1] "Unless the website operator can show that a consumer has actual knowledge of the agreement, an enforceable contract will be found based on an inquiry notice theory only if: (1) the website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms." *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 856 (9th Cir. 2022) (citation omitted); *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171, 1173 (9th Cir. 2014) (refusing to enforce arbitration provision to which the consumer "did not unambiguously manifest assent").

2. No Agreement to Arbitrate was Formed in February 2016

Defendant argues that Plaintiff unambiguously manifested his assent to Defendant's 2014 Terms of Use ("2014 TOU"), and entered into a binding arbitration agreement, when, on February 23, 2016, he created a free account and clicked a box next to the statement, "I accept the Terms and Conditions, am

[1] Plaintiff agrees with Defendant that the Court need not resolve at this stage whether California or Georgia substantive law applies to this dispute because California and Georgia law do not conflict on contract formation. *See* Def. Mot. 11:8-18.

over the age of 13 and if under 18, have the permission of my parent/guardian." Def. Mot. at 6:13-7:18; Huddle Decl. Ex. 6. Considering the context of the transaction (establishment of a free account to watch a video), the Court should find that the use of the words "I accept" without more is insufficient to establish that Plaintiff agreed to be bound by the 2014 TOU and, thus, no agreement to arbitrate was formed at that time. The Miriam Webster dictionary defines the term "accept" to mean "to receive (something offered) willingly"; "to give admittance or approval of"; "to endure without protest or reaction"; and "to regard as proper, normal, or inevitable."[2] Because Defendant utilized the word "accept" not "agree," rather than agreeing to be bound by the "Terms and Conditions," Plaintiff simply acknowledged receiving those Terms and Conditions. Defendant obviously knew how to use definite language to purportedly bind users as seen in the 2014 TOU themselves, which state, "By using, visiting, or browsing the Service, you accept and agree to be bound by these Terms." 2014 TOU (emphasis added). Yet, Defendant chose to use the less definitive term "accept" next to the click box.

The authorities cited by Defendant do not support its position. *Tompkins v. 23andMe, Inc.* was a classic click-wrap agreement; the user had to check a box indicating, "Yes, **I have read and agree** to the Terms of Service and Privacy Statement." 2014 WL 2903752, at *3 (N.D. Cal. June 25, 2015) (emphasis added). And, during the registration process, customers were presented with a box with large font highlighting key provisions in the terms of service which stated, "[w]hen you sign up for 23andMe's service you agree to our Terms of Service" and which contained three hyperlinks to the terms of service and three requests that consumers read those terms. *Id.* at *3. In contrast, in the instant case, Plaintiff did not have to affirm that he read anything and was not advised that checking the box would be interpreted as his agreeing to be bound by any terms. Similarly, in *Peterson v. Lyft, Inc.*, consumers during an online account creation process "were presented with a screen listing the Lyft 'Terms of Service'" which the consumer could scroll through before they were asked to click "'I accept' to complete the creation of their Lyft accounts." 2018 WL 6047085, at *1 (N.D. Cal. Nov. 19, 2018). The Terms of Service which were "listed" for the consumer before he clicked an "I accept" button included a binding arbitration provision. *Id.* Here, Defendant did not display any portion of the relevant Terms of Use before prompting the user to

[2] https://www.merriamwebster.com/dictionary/accept?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited September 13, 2024)

click a box which, it purports, binds that user to those Terms of Use. Finally, in *West v. Uber Technologies*, the district court addressed the specific context of consumers who were presented twice with notice of terms and conditions prior to them registering to become Uber riders. 2017 WL 5848903 (C.D. Cal. Sept. 5, 2018). The instant case, in which Plaintiff merely created a free account, rather than signing up for an account through which he intended to pay for uber rides, and in which Plaintiff saw only one non-specific reference to "terms and conditions" rather than two notices of terms and conditions, and importantly never said he would agree to be bound, is clearly distinguishable.

The failings identified above are further compounded by the 2014 TOU's failure to define to whom those Terms apply. Under California law, it is necessary "not only that the parties to the contract *exist*, but that it is possible to identify them." *Jackson v. Grant*, 890 F. 2d 118, 121 (9th Cir. 1989) (citing Cal. Civ. Code § 1558). The arbitration provision in the 2014 TOU provides "The **parties** specifically agree to submit any controversy or claim arising out of relating to **this agreement,** the Service, or any alleged breach of **this agreement**, or any other controversy or claim between the **parties**…" 2014 TOU (emphases added). Yet, the term "parties" is not defined in the arbitration provision or anywhere in the 2014 TOU. Written agreements are unenforceable as invalid where they fail to "identify with which entity or entities plaintiff has agreed to submit [disputes to] binding arbitration." *Flores v. Nature's Best Distrib., LLC*, 7 Cal.App.5th 1, 9 (2016); *see also Bouarich v. Comerica Mgmt. Co.,* 2021 WL 1782995, at *15-16 (Cal. Ct. App. May 5, 2021) (holding that failure of defendant to identify or define itself as a party to an arbitration agreement *and* its failure to sign the agreement supported a finding of unconscionability).

3. Plaintiff Did Not Agree to Arbitration on Any Other Occasion

a. A New Agreement Needed to be Formed Each Time Plaintiff Subscribed

Defendant contents that Plaintiff is bound by Defendant's updated TOU because he manifested his assent to subsequent versions of these TOU through "continuing use of NFHS Network's services and further acknowledgements of updates to the Terms of Use." Def. Mot. 12:21-23. Not so. Defendant cites to *In re Facebook Biometric Info. Priv. Litig.*, for the proposition that "courts will enforce updates to terms of use when notice of the updates is provided to the user and the user thereafter continues to use the service." *See* Def. Mot. 12:18-21 (quoting *In re Facebook.,* 185 F. Supp. 3d 1155, 1167 (N.D. Cal. 2016) ("[I]ndividualized notice in combination with a user's continued use is enough for notice and assent.")).

But, in that case, the court noted, in the sentence preceding the one quoted here by Defendant, that "none [of the plaintiffs] disputes remaining an active Facebook user to this day . . . ." *In re Facebook,* 185 F. Supp. 3d at 1167. Defendant cites no authority for the proposition that if a consumer enters an agreement to arbitrate in connection with his subscription to a particular service, then unsubscribes from the service and subsequently subscribes anew, several times, he should be treated the same as if he remained a subscriber throughout the entire period.

Plaintiff used NFHS Network's services for certain discrete and distinct periods between February 2016 and May 2024, but he categorically did not use NFHS Network's services between these discrete and distinct subscription periods. This does not constitute "continued use." Defendant's own TOU impliedly recognize this important distinction. For example, the opt-out provision of the 2024 TOU states:

> If you opt out of the dispute resolution provision, that opt out will remain in effect if the NFHS Network modifies this section in the future or you agree to a new term under these Terms of Use. If you enter into a new agreement with NFHS that includes a dispute resolution provision and you want to opt out of that provision, you will need to follow the instructions in that agreement for opting out.

Huddle Decl. Ex. 5 (2024 TOU). This language acknowledges an important distinction between a user who maintains an ongoing subscription, including potentially extending that subscription for an additional term,[3] and a user who, having ended his or her agreement with Defendant, enters a "new agreement." Put another way, the 2024 TOU contemplate that a former subscriber who returns to NFHS Network and creates a new subscription agreement will be treated as if a new customer.

b. Defendant Did Not Show Plaintiff Agreed to Arbitrate in 2016, 2017, 2018 or 2021

Defendant makes no attempt to establish that when Kasper subscribed to its services or logged back in, in September 2016, August 2017, November 2018, or March 2021 he formed an agreement to arbitrate with Defendant. Because the burden to establish the existence of an agreement to arbitrate is on Defendant, its failure to do so requires, at least for Plaintiff's claims arising from Defendant's actions and omissions during these periods, that Defendant's Motion be denied. Plaintiff denies being given any notice of the TOU or manifesting his assent to TOU during any time he entered into a new subscription or logged

[3] Agreement to a "new term" occurs automatically, for example, for subscribers with an NFHS Network Monthly Pass. 2024 TOU (Dkt. 16-12) p. 6 ("The NFHS Network Monthly Pass will renew automatically at the end of the term unless and until you cancel your subscription or submit a request to Customer Services to terminate it.").

back in. Kasper Decl. ¶¶ 4-9; see also Hammond Decl. Ex. 4.

c. Defendant has Failed to Establish that Plaintiff Formed an Agreement in February 2023

i. February 2023: In February 2023, Plaintiff entered into a subscription agreement with Apple, Inc. The documents Defendant relies on to establish an agreement to arbitrate, constitutes nothing more than unenforceable browsewrap. First, Defendant contends that, in February 2023, when Plaintiff subscribed through Apple, Inc.'s iTunes store, he manifested an intention to agree to Defendant's 2022 TOU and the arbitration provision contained therein, when he clicked the button "CHOOSE MONTHLY PASS," with the following disclosures below:

> All subscriptions billed through the iTunes. To cancel your subscription please go to Subscriptions in you iTunes account.
>
> Payment will be charged to iTunes account at confirmation of purchase. Subscription will automatically news unless auto-renew is runed off at least 24 hours before the end of the current period. Account will be charged for renewal within 24 hours prior to the end of the current period. Subscriptions may be managed by the user and auto renewals may be turned off by going to the user's Account Settings after purchase. Any unused portion of the free trial period, if offered, will be forfeited when the user purchases a subscription to that publication where applicable.
>
> For more information see our Terms of Service and Privacy Policy.

Huddle Decl. ¶ 23. Plaintiff did not click on either of the links ("Terms of TOU" or "Privacy Policy"). Kasper Decl. ¶¶ 8-9. Thus, he had no actual notice of the TOU. Moreover, the language "For more information see our Terms of Use and Privacy Policy" is insufficient to put a user on notice of terms or demonstrate his assent. This is a classic browsewrap agreement of which the Ninth Circuit has held:

> [W]here a website makes its terms of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on—without more—is insufficient to give rise to constructive notice.

Nguyen, 763 F.3d at 1178-79.

ii. Cookie Banner: Defendant also contends that, in 2023, when returning to Defendant's website, Plaintiff was notified of the updated 2022 TOU by a cookie banner titled "Policy Banner" with the following statement: "*We're excited to announce the combination of the NFHS Network and GoFan within Playon!Sports. Please feel free to view our updated Terms of Use and Privacy Policy.*" Def. Mot. 8:11-9:2; Huddle Decl. Ex. 9 (Dkt. 16-16). Again, Plaintiff did not click on the hyperlink to the TOU or the

Privacy Policy. Kasper Decl. ¶ 9. And, again, this is a classic unenforceable browsewrap agreement. Here, the banner simply made an offer to consumers to view the Terms of Use ("feel free to view"), gave no notice as to the contents of those Terms, and gave no indication that consumers could expect to be bound by those TOU. And, clicking "continue," as Defendant indicates was required to dismiss the banner, cannot reasonably be said to demonstrate agreement to be bound by the TOU.

iii. 2024 Email: Finally, Defendant contends that on February 14, 2024, Defendant sent an email to Plaintiff notifying him of the updated 2024 TOU. *See* Huddle Decl. ¶ 20, Ex. 11. However, Defendant introduces no evidence to suggest that Plaintiff saw or read the email. This lack of evidence is fatal to any claim that Plaintiff had even inquiry notice of the 2024 TOU. *See Sifuentes v. Dropbox, Inc.*, 2022 WL 2673080, *4 (N.D. Cal. June 29, 2022) (finding no agreement to arbitrate when defendant introduced no evidence to show consumer read email about updated terms of service). Moreover, Defendant does not allege that Plaintiff took any action to "unambiguously manifest his assent." *Id.* (citing *Berman*, 30 F.4th at 856 (requiring consumer to "take[ ] some action, such as clicking a button or checking a box" in order to form an enforceable contract under inquiry notice theory).

C. ENFORCEMENT OF THE DELEGATION CLAUSE AND THE ARBITRATION AGREEMENT WOULD PRECLUDE PLAINTIFF FROM VINDICATING HIS STATUTORY RIGHTS AND REMEDIES

Under the prospective-waiver doctrine (also known as the "effective vindication" exception), a court may "invalidate, on 'public policy' grounds, arbitration agreements that 'operat[e] . . . as a prospective waiver of a party's right to pursue statutory remedies.'" *Am. Express Co. v. Italian Colors Rest*., 570 U.S. 228, 235 (2013) (alterations in original) (emphasis omitted) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 637 n.19 (1985)). The Supreme Court has stated that this exception may "perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable." *Id*. at 236.

Here, the arbitration agreement (and the delegation clause) act as a prospective waiver of the Plaintiff's statutory rights and remedies, at least in reference to the 2014, 2018, and 2022 TOU. These TOU all prohibit the arbitrator from awarding injunctive relief and punitive damages, the very relief afforded by the VPPA. *See, e.g.* Huddle Decl. Ex. 3 (2018 TOU) (prohibiting any injunctive relief and punitive damages: "The arbitrator(s) have no authority to award punitive damages . . . and may not include

in the award any injunction or direction to a party other than to pay a monetary amount"); *Id.,* ¶ Ex. 4 (2022 TOU) (same). In addition, the filing fees associated with even taking a claim to arbitration (and challenging the delegation clause) are so substantial that they effectively block consumers from asking an arbitrator to find the arbitration provision is unenforceable on the basis that it is contrary to public policy. *See* Parts III.D.1.a and III.D.1.b.iv, below. *See Gutierrez v. Autowest, Inc.*, 114 Cal.App.4th 77, 95 (2003) ("[t]he California and United States Supreme Courts agree that arbitral costs may impair the vindication of statutory rights[.]"); *Sonic-Calabasas A, Inc. v. Moreno,* 57 Cal.4th 1109, 1145 (2013) (endorsing *Gutierrez's* view that unaffordable arbitration costs render arbitration agreement substantively unconscionable); *see also Mitsubishi*, 473 U.S. 637 at n. 19 ("In the event…clauses operated in tandem as a prospective waiver of a parties right to purse statutory remedies…we would have little hesitation in condemning the agreement as against public policy." (internal citations omitted)).

Furthermore, Plaintiff seeks the statutory remedy of a public injunction in that he seeks "injunctive relief that has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public." *McGill v. Citibank, N.A.*, 2 Cal.5th 945, 951 (2017); *see* FAC ¶¶ 107-108 (seeking public injunctive relief under the UCL, Cal. Bus. & Prof. Code § 17200, *et seq.*). However, the arbitration provision in the 2024 TOU, as in all prior versions of the TOU, does not permit the arbitrator to issue this type of injunctive relief. *See, e.g.* Huddle Decl. Ex. 3 (2018 TOU); *Id.,* Ex. 5 (2024 TOU) (prohibiting public injunctive relief: "The arbitrator shall have the authority … to grant any non-monetary remedy or relief available to an individual . . . ." (emphasis added)). Thus, the arbitration provision is "contrary to California public policy" and, accordingly, it is "unenforceable under California law." *See McGill*, 2 Cal.5th at 951; *see also McBurnie v. RAC Acceptance East, LLC*, 95 F.4th 1188 (9th Cir. 2024) (denying motion to compel arbitration because arbitration clause waived right to seek public injunctive relief).

D. THE DELEGATION CLAUSE AND ARBITRATION AGREEMENT ARE PERMEATED WITH PROCEDURAL AND SUBSTANTIVE UNCONSCIONABILITY

Under California law a finding of unconscionability has both procedural and substantive components. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 340 (2020) (citing *Armendariz v. Foundation Health Psychcare Services, Inc.,* 24 Cal.4th 83, 114 (2000)). "The two elements operate on a sliding scale such that the more significant one is, the less significant the other need be." *Blake v. Ecker,*

93 Cal.App.4th 728, 742-43 (2001). In the instant case, because they are both procedurally and substantively unconscionable, the arbitration agreement and the delegation clause are unenforceable.

1. The Delegation Clause is Unconscionable

Plaintiff bears the burden of proving that the delegation clause is procedurally and substantively unconscionable. See *Ramirez v. Charter Communications, Inc.*, 16 Cal.5th 478, 492 (2024); *see also Holley-Gallegly v. TA Operating, LLC*, 74 F.4th 997, 1002 (9th Cir. 2023) (stating that, "if a party cites provisions outside of the delegation clause in making an unconscionability challenge, it must explain how those provisions make the fact of an arbitrator deciding arbitrability unconscionable"). The barrier to entry for the Court to consider the arbitrability issue is relatively low. *Bielski v. Coinbase, Inc.,* 87 F.4th 1003, 1010 (9th Cir. 2023) ("Our rule…require[s] a relatively low barrier to entry: if a party's challenge mentions and specifically relates to the validity of the delegation provision in its opposition to the motion to compel arbitration . . ., the federal court has a green light to consider those arguments.").

a. The Delegation Clause is Procedurally Unconscionable.

The delegation clause in each version of the TOU is procedurally unconscionable because it is a contract of adhesion. "[C]ontracts of adhesion, . . . contain a degree of procedural unconscionability even without any notable surprises, and bear within them the clear danger of oppression and overreaching." *Ramirez*, 16 Cal.5th at 494 (quoting *Baltazar v. Forever 21, Inc.*, 62 Cal.4th 1237, 1244 (2016) (internal quotation omitted)).

The delegation clauses in the 2014, 2018, and 2022 TOU are also procedurally unconscionable because the AAA Commercial Rules, to which those TOU refer and which actually contain the applicable delegation provisions, are not attached. Further, these Rules themselves are substantively unconscionable because they require a party to pay an excessive filing fee just to be able to argue that the delegation clause is unconscionable. It would cost over $13,000, including a $7,700 filing fee, for Plaintiff to obtain a ruling in arbitration that the delegation clause is unconscionable, which is far more than the $400 it costs in federal court. *See* Hammond Decl. ¶¶ 4-8; see *Trivedi v. Curexo Tech. Corp.,* 189 Cal.App.4th 387, 393 (2010) ("Numerous cases have held that the failure to provide a copy of the arbitration rules to which the employee would be bound, supported a finding of procedural unconscionability" (collecting cases));

Baltazar, 62 Cal.4th at 1246 (clarifying that failure to attach arbitration rules is only significant when a party alleges those unattached rules are substantively unconscionable.).

In addition, the delegation clause in the 2014 TOU contains an element of surprise because a reasonable user when creating a free account would not expect to be agreeing to delegate questions of arbitrability to an arbitrator when he clicked a box saying "I accept the Terms and Conditions, am over the age of 13 and if under 18, have the permission of my parent/guardian." This is because, as discussed above in Part III.B.2, the term "I accept" is ambiguous, and functions as an acknowledgement and not a manifestation of assent. *See Heckman v. Live Nation Entm't*, *Inc.,* 686 F. Supp. 3d 939, 953 (C.D. Cal. 2023) (indicating that contract formation is a matter different from unfair surprise/procedural unconscionability). And, the delegation clauses in the 2014, 2018, and 2022 TOU contains a further element of surprise because, as discussed above in Part III.B.2, with respect to the 2014 TOU in particular, the arbitration provisions in those TOU fail to identify the persons to whom they purportedly apply.

Moreover, the delegation clauses found in the 2022 and 2024 TOU contain an element of surprise because the Plaintiff allegedly entered into the delegation agreement with NFHS by agreeing to updated TOU presented to him via a cookie banner and continued use of the website. Huddle Decl. ¶¶ 17, 19. The banners did not explain that the Terms included a delegation clause. See *Id.*; see *Pandolfi v. AviaGames, Inc.*, 2024 WL 4051754, *4 (N.D. Cal. Sep. 4, 2024) (finding surprise and procedural unconscionability when delegation clause was hidden in lengthy terms of service). Finally, for similar reasons, the delegation clause contained in the 2024 TOU contains an element of surprise because Defendant argues that Plaintiff entered into the delegation agreement with NFHS when he was merely sent an email which Defendant did not establish was viewed by the Plaintiff and to which Plaintiff was not required to give any indication whatsoever of consent. *See* Huddle Decl. ¶ 20; *see* Kasper Decl. ¶ 10.

b. The Delegation Clause is Substantively Unconscionable

i. <u>The Delegation Clause is Non-Mutual</u>

An arbitration agreement "imposed in an adhesive context" cannot require "one contracting party, but not the other, to arbitrate all claims arising out of the same transaction or occurrence or series of transactions or occurrences." *Armendariz*, 24 Cal.4th at 120. Yet, the delegation clause in the 2024 TOU is non-mutual because the arbitration agreement provides:

> Please read this arbitration agreement…it requires you to arbitrate disputes with us and limits the manner in which you can seek relief from us…You agree that any dispute, controversy, or claim relating to your access or use of the Service or any aspect of your relationship with us, will be resolved by binding arbitration…including the threshold questions of arbitrability of such a dispute, controversy, or claim…

Huddle Decl. Ex 5. As the California Supreme Court explained in *Armendariz*:

> . . . it is unfairly one-sided for an employer with superior bargaining power to impose arbitration on the…plaintiff but not to accept such limitations when it seeks to prosecute a claim against the [plaintiff] . . . Without reasonable justification for this lack of mutuality, arbitration appears less as a forum for neutral dispute resolution and more as a means of maximizing employer advantage. . . . Although parties are free to contract for asymmetrical remedies and arbitration clauses of varying scope, . . . the doctrine of unconscionability limits the extent to which a stronger party may, through a contract of adhesion, impose the arbitration forum on the weaker party without accepting that forum for itself.

24 Cal.4th at 118. Here, the delegation clause (and arbitration agreement as a whole) is one-sided. Defendant has not provided *any* justification for this lack of mutuality, and on this ground alone, the delegation clause and the arbitration agreement as a whole should be found unconscionable.

The delegation clauses in the 2014, 2018, and 2022 TOU are also non-mutual, albeit less obviously so. The arbitration provisions in these TOU, which contain the references to AAA rules which include the respective delegation clauses, provide that "[t]he parties specifically agree to submit any controversy or claim arising out of or relating to this agreement, the Service, or any breach of this agreement…to the AAA…" The term "this agreement" is not defined in the TOU but must refer only to the arbitration agreement. The TOU, along with certain other terms and conditions are collectively referred to by the word "Terms." The term "Service" is defined as "use of the NFHS Network site and service." As such, the delegation clause, by its terms, applies only to a party who has "use of the NFHS Network site and service," such as video producers, schools who provide content, and subscribers to the site. The Defendant does not have "use of the NFHS Network site and service." As a result, these delegation clauses are non-mutual and unconscionable.

ii. The Chilling Effect of the Prevailing Party Attorneys' Fee Provision

At the time of contract formation (assuming there was one, and in reference to the 2014, 2018 and 2022 TOU), the delegation clause taken together with the arbitration provision that provides for the award of attorneys' fees to the prevailing party (*see, e.g.,* Huddle Decl. Ex. 3 (2018 TOU), p. 11), have a chilling

effect on Plaintiff and consumers. *See MacClelland v. Cello P'ship,* 609 F. Supp. 3d 1024, 1041 (N.D. Cal. 2022) (considering chilling effect of a bellwether provision on persons in addition to plaintiffs). Such a chilling effect is unconscionable. *See Ramirez,* 16 Cal.5th at 508-09 (taking note that, under provision which requires a party resisting arbitration to pay the other party's fees and costs incurred in compelling arbitration, a party moving to compel arbitration could potentially get fees and costs if a court were to find unconscionability but then sever the unconscionable terms – this "[possible] outcome could chill an employee's right to challenge the enforceability of an arbitration agreement"); *see also Pandolfi,* 2023 WL 4051754, at *5.

iii. The Arbitrator Cannot Decide that the Delegation Clause is Unconscionable

At the time of contract formation (assuming there was one, and in reference to the 2014, 2018 and 2022 TOU), the delegation clause taken together with the arbitration provision that prohibits the arbitrator from awarding injunctive relief and any non-monetary relief (*see* discussion at Part III.C above), combine to have a chilling effect on consumers by foreclosing their ability to challenge the delegation clause. This is because Plaintiff is prevented from vindicating his statutory rights to seek equitable relief (Cal. Civ. Proc. Code § 1060) in the form of a declaration that the delegation clause (and the arbitration provision as a whole) is unconscionable. *See Mitsubishi,* 473 U.S 637 at n. 19 ("In the event…clauses operated in tandem as a prospective waiver of a parties right to purse statutory remedies…we would have little hesitation in condemning the agreement as against public policy.").

iv. The Chilling Effect of Provisions Regarding Filing and Arbitral Fees

At the time of contract formation (assuming there was one, and in reference to the 2014, 2018 and 2022 TOU), the delegation clause taken together with the arbitration provision that provides it will cost Plaintiff and other consumers over $13,000 to have the issue of delegation put before the arbitrator (which the arbitrator cannot decide) and over $30,000 to arbitrate the merits, have a chilling effect on Plaintiff and other consumers' desire/ability to bring pursue their claims. *See* Hammond Decl. ¶¶ 4-11. Neither Plaintiff nor any reasonable consumers would spend that kind of money to bring an issue before an arbitrator, even if the arbitrator has the power to decide it. In addition, the AAA requires consumers to make a prompt demand and prepay fees in order to obtain a participatory hearing. *See* Hammond Decl. Ex. 1 at Rule R-4(a). The likely effect of this is that most consumers are denied a hearing, particularly

because of the typically small amounts in controversy. *Patterson v. ITT Consumer Fin'l Corp*., 14 Cal.App.4th 1659, 1665-66 (1993). Moreover, the high filing and arbitral fees on the issue of delegation alone will prevent Plaintiff from vindicating his statutory rights. *Armendariz*, 24 Cal.4th at 110 (noting that the risk that an employee would have "to bear large costs to vindicate their statutory right against workplace discrimination" could have a "chill[ing] [effect on] the exercise of that right").

2. The Arbitration Agreement is Unconscionable

The arbitration agreement is unconscionable for the same reasons as the delegation clauses, as well as the following additional reasons as they relate to substantive unconscionability for each respective TOU.

a. Additional Substantively Unconscionable Provisions in the 2024 TOU

The 2024 TOU is substantively unconscionable because it contains a pre-dispute waiver of all class action proceedings, whether the proceedings are in court or in arbitration. *Fisher v. DCH Temecula Imports, LLC,* 187 Cal.App.4th 601, 614-619 (2010) (citing *Discover Bank v. Sup. Ct.,* 36 Cal.4th 148, 160-161 (2005)). Additionally, it contains a pre-dispute jury waiver which makes the arbitration agreement substantively unconscionable. *See In re County of Orange*, 2015 WL 1727240 (9th Cir. Apr. 16, 2015). Under California law, pre-dispute jury trial waivers are unenforceable as a matter of public policy, unless expressly authorized by statute. *Grafton Partners L.P. v. Sup. Court*, 36 Cal.4th 944, 955, 961 (2005).

b. Additional Substantively Unconscionable Provisions in the 2014, 2018, and 2022 TOU

The 2014, 2018 and 2022 TOU contain several additional substantively unconscionable provisions.

Vindication of Statutory Rights: The arbitration agreements in the 2014, 2018, and 2022 TOU prevent consumers from vindicating their statutory remedies by prohibiting the arbitrator from awarding injunctive and other non-monetary relief, and punitive damages, the very relief afforded by the VPPA.[4] *See* discussion at Part III.C, above. *See Mitsubishi*, 473 U.S 637 at n. 19 ("[I]n the event…clauses operated in tandem as a prospective waiver of a party's right to purse statutory remedies…we would have little hesitation in condemning the agreement as against public policy." (citations omitted)). In addition to this prohibition, the prohibitively expensive filing and arbitral forum fees, described above, also impermissibly

[4] *See* Complaint (Dkt. 1-2), ¶¶ 10, 89, 104, 113-114, seeking declaratory and injunctive relief under Cal. Bus. & Prof. Code § 17203; punitive damages under 18 U.S.C. § 2710(c)(2)(B); and civil penalties under Cal. Civ. Proc. Code § 1799.3(c).

infringe up consumers' ability to seek statutory remedies. *See* discussion in Parts III.C and III.D.1.b.iv, above, on effective vindication.

Prevailing Party Attorneys' Fees: The arbitration agreement allows for the prevailing Defendant to be awarded fees, in direct contradiction to the VPPA. To allow the prevailing Defendant to recover fees, would deny the plaintiff the rights guaranteed by the VPPA with a corresponding chill on access to the courts for any consumer who has an arguably meritorious argument that the [Agreement] is unenforceable. *See Patterson,* 70 Cal.App.5th at 488 (*citing Trivedi,* 189 Cal.App.4th at 395) (disapproved on another ground in *Baltazar*, 62 Cal.4th at 1246)).

Prohibition on all Discovery: The arbitration agreement prohibits the arbitrator from ordering any discovery (cite) outside the exchange of relevant documents. This is unconscionable in a case like this that will require depositions of software engineers, corporate representatives, and expert discovery. *See Fitz v. NCR Corp.,* 118 Cal.App.4th 702 (2004).

E. SEVERABILITY

Each version of the TOU contains a severability clause. However, where, as here, an arbitration agreement is permeated by unconscionability, a court will not sever the unlawful provisions. *See Jackson v. S.A.W. Entm't,* 629 F. Supp. 2d 1018, 1030 (2009). The unconscionable provisions in this case evince a systematic effort to impose arbitration on a customer as an inferior forum. *Newton v. Am. Debt Servs.,* 854 F. Supp. 2d 712, 729 (N.D. Cal. 2012). Moreover, were the Court to sever the numerous unconscionable provisions in the instant case, it would create a "perverse incentive" where companies could be incentivized to retain unenforceable provisions designed to chill customers' vindication of their rights, then simply propose to sever these provisions in the rare event that they are challenged successfully in court. *See Capili v. Finish Line, Inc.*, 116 F. Supp. 3d 1000, 1009 (N.D. Cal. 2015).

IV. CONCLUSION

For the foregoing reasons the Court should deny Defendant's Motion in its entirety.

Dated: September 13, 2024

HAMMONDLAW, P.C.

/s/ Julian Hammond
Julian Hammond

Attorneys for Plaintiff